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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 408 Misc. 761

JOHN HUGHES and LOUIS RICHARDSON,

Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF CONTRA COSTA,

Respondent.

BRIEF FOR THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI.

ARTHUR J. GOLDBERG,
General Counsel,
THOMAS E. HARRIS,
Assistant General Counsel,

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The Congress of Industrial Organizations files the within memorandum on behalf of its members because this case represents a dangerous encroachment on one of the basic rights of labor in this country—a right often recognized by this Court. The decision of the California Supreme Court attempts to place limitations on the right to picket peacefully far more stringent than those permitted by this Court's interpretation of the Constitution.

Question Presented by This Case.

1. This case presents squarely the question whether a state court can, merely by declaring that peaceful picketing is for an "unlawful purpose" as defined by its own judicial decisions, confer upon itself power to enjoin such picketing despite the protection of the Fourteenth Amendment.

This bootstrap-lifting technique, simply stated, involves two premises: First, picketing which does not have a "legal purpose" is not within the scope of the United States Constitution. Second, it is the function of the state courts to define the term "legal purpose." Yet this technique, although clearly grounded on fallacious reasoning, involves perhaps the most serious of recent efforts to infringe upon the right to picket.

This Court's "Peaceful Picketing" Doctrine.

2. The judicially created "illegal purpose" limitation on the right to picket has had a long history both in the state and in the federal courts. But until decisions like that of the court below began seeking the revival of the "illegal purpose" theory, it had been supposed that *Thornhill* v. *Alabama*, 310 U. S. 88 (1940), and subsequent cases decided by this Court had laid that doctrine to rest. In the *Thornhill* decision this Court first held that the kinship between peaceful picketing and other forms of communication was such that the former, like the latter, was protected by the First and Fourteenth Amendments. The scope of the *Thornhill* doctrine was more clearly defined when later decisions emphasized the non-speech aspects of picketing to add restrictions not imposed by the "clear and present danger" test alone. Thus, in *Carpenters & Joiners Union* v. *Ritter's Cafe*, 315 U. S. 722 (1942), this

Court affirmed the issuance of an injunction which limited picketing to the "area of the industry in which a labor dispute arises," thus prohibiting the "conscription of neutrals." And in *Giboney v. Empire Storage and Ice Company*, 17 U. S. Law Week 4307 (April 4, 1949), a state court was permitted to enjoin picketing the purpose of which was to compel an employer to violate the state anti trade restraint statutes. Even the *Giboney* case, however, may represent an application of the "clear and present danger" doctrine, in light of Justice Black's statement in his opinion that "[t]here was clear danger, imminent and immediate, that unless restrained, appellants would succeed in making that policy a dead letter insofar as purchases by nonunion men were concerned." 17 U. S. Law Week at 4310.

But every decision of this Court has clearly recognized that the constitutional status of picketing makes the limitations on the right to picket, as well as the right itself, a federal question to be ascertained by reference to the Constitution. State tort law definitions are not determinative of the right. True, a state court's decision that "the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful" could serve as a basis for enjoining such future picketing. *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U. S. 287 (1941). But this was no more than the state's expression, through its courts, of a belief that a "clear and present danger" existed and this Court is the final arbiter of the weight to be given that expression.

Effect of the Giboney Decision.

3. In *Giboney v. Empire Storage and Ice Company*, 17 U. S. Law Week 4307, 4309 (April 4, 1949), this Court's most recent decision on the subject of picketing, Justice

Brandeis' opinion in *Duplex Printing Co. v. Deering*, 254 U. S. 443, 488 (1921), was quoted with approval:

> "The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. *But it is not for judges to determine whether such conditions exist. Nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands.* This is the function of the legislature which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat [italics added]."

Throughout its opinion, this Court emphasized the fact that the case involved not "publicizing to be treated in isolation" but, "peaceful picketing carried on as an essential and inseparable part of a course of conduct which is in violation of the state law.":

> "Thus all of appellants' activities, their power[illegible] transportation combination, their patrolling, the formation of a picket line warning union men not to cross at peril of their union membership, their publicizing, constituted a single and integrated course of conduct which was in violation of Missouri's valid law. In this situation, the injunction did no more than enjoin an offense against Missouri law, a felony.
>
> "It rarely has been suggested that the constitutional freedom of speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now."

But the present case involves no question of legislative control over peaceful picketing. It represents an attempt by state judges to violate the principle enunciated by Justice Brandeis and approved by this Court. It is respectfully submitted that the *Gibson* decision supports the contention of this amicus curiae that certiorari should be granted

in the present case and that the decision of the California Supreme Court should be set aside.

Nature of Picketing Involved in Present Case.

4. In the present case, the picketing was admittedly peaceful, perhaps the most peaceful to come before this Court since the *Thornhill* case.[1] Not only was there no suggestion of violence, but the picketing itself was in its nature, pure communication—"publicizing in isolation" without even an appeal to organized labor which might increase its success as a persuasive measure. The doctrine of the *Meadowmoor* case and *Hotel & Restaurant Employees International Union v. Wisconsin ERB*, 315 U. S. 437 (1942), is therefore inapplicable. The picketing was directed at the establishment of the employer directly involved; so that the "conscription of neutrals" condemned in the *Ritter* case was absent. No violation of state anti-trust laws or other state statutes was charged, so that the situation in the *Columbia* case was not present. Yet the California Supreme Court, simply by stating that the picketing was for an "unlawful" purpose as a California common law tort, purported to withdraw the protection of the Constitution from that picketing.

State Courts' Usurpation of This Court's Powers.

5. An acceptance of the decision of the California Supreme Court in this case will involve an abdication by this Court of its position as ultimate interpreter of the Constitution. The consequences of allowing state court declarations of "legality" to give content to a constitutional guaranty are well illustrated by this case. The California Supreme Court stated that picketing to urge an employer to hire a number of Negro clerks "based

on the proportion of white and Negro customers patronizing [its] stores" is picketing for an "unlawful" objective. The court assumed without deciding that "picketing to protest [discrimination against Negroes in employing clerks] would not be for an unlawful purpose." But if certiorari is denied merely because picketing was "unlawful" by California judicial standards, the same court, merely by making the opposite assumption, could immediately shrink the scope of protection afforded by the Fourteenth Amendment. And, by the same token, a state decision that picketing was for an unlawful objective if no "labor dispute" existed under state law would further contract the constitutional guaranty. Yet the latter contention, basically no different than that of respondent in the present case, has already been met and rejected by this Court in *AFL* v. *Swing*, 312 U. S. 321 (1941), and in *Cafeteria Employees Union* v. *Angelos*, 320 U. S. 293, 295-96 (1943).

Present Confusion in State Courts.

6. If state court notions of legality are to define the scope of constitutionally protected picketing, identical conduct will wear the mantle of constitutional immunity in one state while being subject to "government by injunction" in another. The anomalous result of such uncertainty in an area where certainty is essential is strikingly illustrated by two Texas Supreme Court opinions handed down on March 23, 1949. In *International Union of Operating Engineers* v. *Carr*, 16 CCH Labor Cases ¶ 65,052 (1949), the Texas court invoked this Court's peaceful picketing cases to invalidate a statute which effectively limited picketing to "labor disputes"—defined by the legislature as requiring a controversy between an employer and a majority of his employees. Yet the same court felt free

in *Dickson v. North East Texas Motor Lines, Inc.*, 16 CCH Labor Cases ¶ 65,954 (1949), to adopt its *own* definition of "labor dispute" in order to affirm a trial court's injunction prohibiting admittedly peaceful picketing.

Such decisions may represent confusion on the part of the Texas court as to the full scope of the constitutional guaranty announced in this Court's decisions. But they may instead be the most recent manifestations of the seeming reluctance of many state courts to accept peaceful picketing as an exercise of free speech. See 5 Wash. & Lee L. Rev. 259 (1948). In either event, it should be made crystal clear to such courts that the non-enjoinability of picketing is to be determined not by state tort law but by United States constitutional law. Dodd, *Picketing and Free Speech: A Dissent*, 56 Harv. L. Rev. 513, 528-30 (1943). Only a clear statement by this Court of the full extent to which peaceful picketing is immune from state judicial action can prevent decisions like those in the *Dickson* case and the present case.

Conclusion.

The picketing enjoined by the court below was wholly peaceful in its nature and subject to none of the limitations imposed on the right to picket by this Court's interpretation of the Constitution. To deny certiorari in this case would be to subject labor once again to "government by injunction", a control limited only by state judicial notions of "unlawful" purposes of picketing. The judgment below should be reversed.

Respectfully submitted.

Arthur J. Goldberg,
General Counsel.

Thomas E. Harris,
Assistant General Counsel.